SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-909

J. HOWARD SMITH, INC., J. H. BAKER & BRO. INC., WILBUR ELLIS COMPANY, INTERNATIONAL PROTEINS CORP., CARGILL, INC. and GLOUCESTER BY-PRODUCTS INC.

Petitioners,

v.

S.S. MARANON, her engines, boilers, etc., and CORPORACION PERUANA DE VAPORES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of the Case

This case involves damage to a cargo of bagged fishmeal caused by fire. It was tried in the United States District Court for the Southern District of New York. The Trial Judge found no liability to rest on the part of the Respondent-vessel owner for damage to the cargo since it was occasioned by fire. The Court allowed Respondent-vessel owner to recover from the Petitioners sums due from them as cargo owners in General Average.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court in all respects. Additionally, that Court subsequently denied a Petition for Rehearing and a Suggestion for Rehearing In Banc. The opinion of the Court of Appeals is reported at 501 F. 2d 1275. The opinion of the Trial Judge is not officially reported.

Events of the Voyage Which Were Established at Trial

The S.S. MARANON, which was owned by Respondent, loaded about 132,000 bags of fishmeal at four different ports in Peru. It was contemplated that the vessel would proceed via the Panama Canal to Baltimore, Maryland. Because of fires which developed in the cargo during the voyage, the vessel diverted to Savannah, Georgia, where the voyage was terminated and General Average declared by Respondent as vessel owner.

On the third day out of her last loading port in Peru and prior to her arrival in the Canal Zone area, the vessel experienced overheating and/or fire in some of her cargo. This was handled at sea and the Master caused several bags to be placed on deck while some were thrown overboard. Later, the vessel stopped in the Canal Zone, calling first at Balboa and then at Cristobal.

She was boarded by surveyors who examined the cargo and checked temperatures. The Master then decid'd to sail for Baltimore, having been personally satisfied that the existing conditions warranted this action and having in mind the safety of the crew, the vessel and the cargo. Trindade Dep., Ex. Vol. pp. 26-27. As it developed, additional overheating and fires broke out in the cargo after the vessel departed from Cristobal and in light of conditions then encountered, the Master determined that he could not reach Baltimore safely. He thereupon diverted to Savannah, where the cargo was discharged and the voyage terminated. Pre-Trial Order, App. pp. 24a-25a.

The Questions Presented by Petitioners do not Pose Issues of Federal Law to be Settled by This Court.

Petitioners' first question asks if a cargo owner is deprived of the prima facie effect afforded to a clean bill of lading where an inherent defect or vice of the goods may have caused damage. The question, as stated, is not relevant to the issues in this case, because Respondent interposed a defense of "fire". It offered proof

that the cargo had been properly ventilated and that fire and overheating which originated in the cargo had caused the damage. An issue concerning the internal condition of the cargo within the bags and its fitness for carriage was thus raised, especially since the cargo was subject to spontaneous combustion. The Trial Judge and the Court of Appeals in this case, citing cases in support thereof, held that where an inherent defect or vice of the goods is an element of the case, the cargo owner must prove that the cargo was in *actual* good order when shipped. There isn't any conflict concerning this rule in the decision of the Court of Appeals in this case because the Trial Judge and the Court of Appeals were satisfied, based on the facts, that the cargo was damaged by fire from an internal cause within the fishmeal and not from an *external* one.

Petitioners, in posing question 1, seek to circumvent the fact that Respondent established that the damage to cargo came about by reason of fire and they omit noting the burden of proof which falls upon a cargo owner in a "fire" case. The Trial Judge and the Court of Appeals concluded that Respondent was not liable to the Petitioners by reason of the provisions of the Fire Statute, 46 U. S. C. 182, and the provisions of the U. S. Carriage of Goods by Sea Act, 46 U. S. C. 1304(2)(b). Under these statutes a vessel owner is not liable for damage to cargo caused by fire unless the fire was caused by the "design or neglect" or by the "actual fault or privity" of the owner.

Question 2 which the Petitioners present contains erroneous statements of fact, which renders it unworthy of consideration. The certificate to which Petitioners refer was prepared by the shippers, not by the Respondent. The latter had no role in its preparation nor did it have knowledge about the actual condition or fitness of the single lot of cargo to which the certificate referred.

Petitioners' question 3 seeks to imply that the provisions of the statutes cited therein were misinterpreted by the Trial Judge and by the Court of Appeals. They suggest that both Courts

ruled that Respondent was not required to use reasonable efforts to prevent aggravation of damage. It hardly need be said that there were no rulings of that nature in this case. Moreover, the Trial Judge found that all reasonable steps had been taken on board the vessel to protect the cargo. His finding was accepted by the Court of Appeals which took occasion to note in its opinion that the conduct of the crew and captain actually minimized the damage.

In presenting question 4, Petitioners quite clearly are seeking to have this Court review findings of fact made by the Trial Judge. The question does not present an issue of law, but it does contain an erroneous statement in alleging that the Trial Court made a finding of fact which was inconsistent with a fact upon which the parties had stipulated. The alleged inconsistency refers to a choice of words which were used to describe the condition of part of the cargo before the vessel arrived at Balboa. The words involved are "fire" and "overheating". In describing the condition of the cargo during the stage of the voyage mentioned, the parties had referred to "fire", whereas the Trial Judge used the word "overheating". The outcome of the case was not altered thereby.

The Petition Contains Certain Inaccuracies.

In their Petition, Petitioners stated in a number of places that the Respondent directed the Master of the vessel to continue the voyage after the vessel had stopped in the Canal Zone. This is not a correct statement. Petitioners raised this issue at trial and in the Court of Appeals, but it was resolved against them, the Courts having determined that the Master made the decision to proceed. Additionally, they concluded that his judgment in this regard was not supplanted by Respondent. Thus, Petitioners are not in a position to state to this Court, without reservation, that Respondent directed the Master to proceed with the voyage from the Canal Zone.

Petitioners' Statement of the Case contains certain other unsupported contentions which warrant comment. Petitioners suggest to this Court that there was error on the part of the

Court of Appeals in making an additional finding in this case. There was, however, no additional finding made. Petitioners base their contention on a step taken by the Court of Appeals to correct a printing error. The error did not appear in the original typewritten opinion of the Court of Appeals, dated July 25, 1974. The printed copy disclosed a repetition of words reading:

> "There was testimony that the gas might condens [sic] and cause further damage, and that the gas might condense and cause further damage, and damage to the cargo." (Appendix to Petition, p. B-6).

A correction was subsequently made in a memorandum issued by the Clerk of the Court of Appeals. The printing error was corrected—words which had been repeated were deleted and words which had been omitted were added. The following words which were used in the typewritten opinion were restored to complete the sentence:

> "conduct of the crew and captain actually minimized" [damage to the cargo]. (Appendix to Petition, p. D-2).

Another inaccuracy appears in the Petition. Petitioners, in suggesting that the Court of Appeals should have interpreted the evidence in a light favorable to them and ruled that the findings of the Trial Judge were erroneous, have stated that the evidence presented at trial was substantially in the form of depositions and documents. This was not so and the record discloses that in this case, only two (2) depositions were offered at trial, whereas six (6) witnesses testified personally before the Trial Judge.

Petitioners Seek to Have This Court Consider Findings of Fact.

Petitioners suggest to this Court that there are questions of law which involve conflicts between the Court of Appeals for the Second Circuit and the Courts of other circuits, but their Petition reveals that they seek to have this Court consider Findings of Fact.

Although there are others, three comments which are made in the Petition and which are cited at random, illustrate that Petitioners continue to dispute findings of fact in this case.

(1) Referring to the finding of the Trial Judge that the decision of the Master not to employ the vessel's CO_2 equipment was not improper, Petitioners state:

"This finding was unsupported * * *". (Petition, p. 8).

(2) Referring to the testimony of the Master concerning proper ventilation of the cargo, testimony which was accepted by the Trial Judge, Petitioners state:

"His own messages as well as his log contradict him". (Petition, p. 20)

(3) Referring to the finding of the Trial Judge that Respondent did not take over control of the vessel from her Master and direct the vessel to proceed from the Canal Zone, Petitioners state:

"The determination was based on the unsupported testimony of the master . . . It cannot be disputed that the master was an interested witness and his testimony standing alone can hardly be considered of sufficient weight to overcome the other evidence which demonstrated that respondent had intervened, and that the master acted only after receiving instructions from respondent." (Petition, p. 20)

Certain Cases Cited by Petitioners Are Not Relevant.

Petitioners cite *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind*, 371 F. 2d 537 (2d Cir. 1967). That case did not involve a defense based upon "fire" and for that reason it is not relevant, since the burden of proof is different in a "fire" case. Apart from that, however, the case is not relevant since the proof established that the damage involved was caused by the carrier's negligence. The Court concluded that since the carrier's negligence was established, the shipper was not required to offer

direct evidence that the cargo was in good order and condition when shipped. Here, proof of the carrier's negligence was not established. On the contrary, the damage was shown to have been caused by fire.

Petitioners also cite *Brown & Williamson Corp.* v. *the S.S. Anghyra,* 157 F. Supp. 737 (E. D. Va. 1957) reversed in part, 277 F. 2d 9 (4th Cir. 1960) (cert. denied 364 U. S. 879), as illustrating an alleged conflict between circuits concerning burden of proof in an "inherent vice" case. Damage to tobacco by heat was involved and the trial judge outlined in detail how the cargo had been processed and baled prior to shipment. The Court considered the vessel owner to have the burden of establishing damage caused by inherent vice, but apart from this the Court found that the damage was caused by heat during the voyage, for which the vessel was responsible. The District Court's decision, on the cause of damage, was reversed by the U. S. Court of Appeals for the 4th Circuit in *Hellenic Lines Ltd.* v. *Brown & Williamson Corp.,* 277 F. 2d 9 (4th Cir. 1960) (cert. denied 364 U. S. 879). That Court found, upon the facts, that the vessel owner had taken proper steps to protect the cargo from overheating and it concluded that the District Court ". . . was in error in holding the ship responsible for the heat damage to the cargo". (at p. 15). Thus, the case is not relevant here.

Petitioners cite *United States* v. *Central Gulf Steamship Corporation,* 340 F. Supp. 473 (E. D. La. 1972). Again, that case did not involve a defense based upon "fire". Moreover, no conflict is shown since the Court merely stated that where a carrier proves, in the first instance, that loss was due to an excepted cause, the shipper then has the burden of proving the carrier's liability. In this case "fire" was shown by Respondent to have been the excepted cause. Thus, even under the rule mentioned in the case cited, Petitioners have the burden of proving liability of the carrier.

States Marine Corp. of Del. v. *Producers Coop. Packing Co.,* 310 F. 2d 206 (9th Cir. 1962) is also cited in the Petition. Petitioners rely on it to support their contention that a conflict exists between Courts about the interpretation to be given to

The Niel Maersk, 91 F. 2d 932 (2d Cir. 1937) (cert. denied 302 U. S. 753). This case does not reveal any conflict as demonstrated by the Court's comment that the trial court's opinion "adequately distinguishes the Niel Maersk case", p. 209.

The Decision of the Court of Appeals Does not Present a Conflict as Petitioners Contend.

Petitioners contend that the prima facie effect of a clean bill of lading has been changed by the Court of Appeals. They take the position that in this case the Court of Appeals went beyond what it had held in *The Niel Maersk, supra.* However, this is not the case and Petitioners are really seeking to overcome the burden of proof which was theirs. The general rule was noted by the Trial Judge (Appendix to Petition, at p. A-4), and by the Court of Appeals (Appendix to Petition, at p. B-3). Both Courts stated that in instances where the cargo may have an inherent or latent defect, the cargo owner must show delivery to the carrier in good condition.

Petitioners' legal position, whether it involves burden of proof, prima facie effect of clean bills of lading, or apportionment of damages, is predicated upon a false premise, or assumption, i.e., that some fishmeal was damaged from external causes. Neither the Trial Judge nor the Court of Appeals so found and the statement that some of the cargo was "admittedly damaged by external causes" (Petition, p. 10) is completely inaccurate.

Petitioners argue that the Court of Appeals for the Second Circuit does not give proper legal effect to clean bills of lading in cases where damage may have been due to external causes. The argument is contradicted by that Court in *Tupman Thurlow Co., Inc.* v. *S.S. Cap Castillo*, 490 F. 2d 302 (2d Cir. 1974). There, the Court noted that:

> "Where * * * the external appearance of cargo is probative of the condition of the goods, clean bills of lading are evidence of good condition. * * *" (Footnote 2, at p. 305).

Petitioners, in presenting their legal argument, do not take into account that the cargo was damaged by fire. Thus, they avoid taking issue with a fundamental point of law which is involved in the case. The point involves burden of proof in a case where, as here, Respondent's principal defense was "fire", based upon its freedom from liability under the provisions of the Fire Statute, 46 U. S. C. 182, and the Carriage of Goods by Sea Act, 46 U. S. C. § 1304(2)(b). Concerning these Statutes, the Court of Appeals referred to the burden which Petitioners did not meet in this case. The Court stated:

> "To impose liability on the shipowner for the loss suffered to the cargo, the cargo owner must show 'design or neglect' or 'actual fault or privity' by the carrier. Negligence of the master or the crew will not suffice. * * * Appellants' case does not meet this statutory standard." (Appendix to Petition, p. B-3).

The Respondent came forward with evidence at trial showing that the cargo was damaged by fire. At that stage, the burden was on the Petitioners to show that the fire was caused by the "design or neglect" or "actual fault of privity" of the Respondent. Since the cargo was susceptible to spontaneous combustion, Petitioners, having the burden, should have offered evidence to show the true condition of the cargo at the time of loading. Although several lots of fishmeal were involved, Petitioners elected to offer one certificate into evidence, allegedly to show the condition of one lot. Petitioners offered no evidence at all with respect to the alleged fitness of the remaining lots.

The Certificate Did Not Prove Fitness.

Among other cases, the Trial Judge and the Court of Appeals relied upon *The Neil Maersk, supra.* In that case, carriage of fishmeal was also involved, and the District Court had found ventilation to have been improper, whereas in this case, both ventilation and stowage were found to be adequate. In *The Niel Maersk*, the cargo owner, like Petitioners here, had failed to prove the actual condition of the fishmeal at the time of ship-

ment. It sought to rely on a certificate which the Court ruled was insufficient. The Court of Appeals stated as follows:

> "Assuming that the findings of the District Court as to stowage and ventilation and as to the condition of the meal when delivered were correct, we differ with the result it reached because there was no proof that the meal when shipped was merchantable or in a condition fit for transportation. Indeed, we find no competent proof in the record as to what was its condition. The tendency of fish meal to deteriorate depends on whether it contains an excess of moisture or oil. There was no proof whatever as to the oil content of the bags, and the only attempt to prove the water content was by the certificates by the Fish Meal Producers & Exporters Association of Japan. That association certified the moisture content at 9.29 per cent, which, according to the testimony of Manning who seems to have been the most disinterested and credible witness on the subject, was above the water content proper for transportation. But the certificates of the Exporters Association were surely not competent proof. They were in no way official documents entitled to be received in evidence, and without them there was nothing to show the condition of the fish meal when shipped. The recitals of 'apparent good order and condition' in the bills of lading furnished only prima facie proof of the external condition of the bags. But the external condition would not show whether the contents were potentially subject to decay or had begun to heat up or deteriorate owing to excess of moisture or other causes such as excess of oil." at p. 933.

The matter of offering evidence in the form of certificates relating to the fitness of cargo was also considered by the U. S. Court of Appeals for the Seventh Circuit in *Aunt Mid. Inc.* v. *Fjell-Oranje Lines, et al.*, 458 F. 2d 712 (7 Cir. 1972) (cert. den. 409 U. S. 877). In that case, certificates had been issued by a department of the Dutch Government, indicating that a cargo of Danish cabbage had been examined and found to be substanially free from disease and pests. In stating that the certificates had properly been excluded, the Court stated:

> "This was not a situation where a certificate recorded a purely factual matter, such as the number of bags of

> cabbage, whether they [sic] were any objective visual evidences of bruising or other damage to the cabbages, or even that the shipment was in apparent good condition. Here, the 'truth' which [Plaintiff] wanted in evidence was an opinion that the cabbages were free of injurious diseases. In view of the testimony of the nature of the particular diseases attacking the cabbages, it appears clear that something more than a mere routine visual examination or inspection would have been required to support the opinion. The district court correctly pointed out that the piece of paper could not be cross-examined, and the inspector could not be." at p. 719.

Petitioners failed in their attempt to show fitness of one lot of fishmeal at the time of loading. They made no attempt at all to offer any proof concerning the other lots. Additionally, they failed to prove that the fire on board the MARANON was caused by the "design or neglect" or "actual fault or privity" of Respondent. Their attempt to convince this Court that an important question of federal law is involved which should be settled by this Court is without substance.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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